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OCT 28 1941

In the

Supreme Court of the United States

October Term, 1941

No. 652

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT

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DANIEL W. HOAN,

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THE JOURNAL COMPANY, HARRY J. GRANT and LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT

The petitioner seeks a review of a judgment of the Supreme Court of Wisconsin affirming a judgment of the Circuit Court for Milwaukee County, Wisconsin, dismissing the complaint in an action for libel in which the petitioner was plaintiff and the respondents were defendants.

The opinion of the Supreme Court of Wisconsin (R. 498-515; Rehearing 517-518) is reported as follows:

Hoan v. Journal Co., 238 Wis. 311 (Adv. Sheet No. 4, dated July 21, 1941), 298 N. W. 228.

The petition does not conform either to section 2 of Rule 38 or section 1 of Rule 12; but we shall answer it as though adapted thereto.

STATEMENT OF MATTER INVOLVED

The complaint was based on the following matter appearing in an article published in the Milwaukee Journal, covering an interview with one F. W. Leighton:

> "The mayor of Sheboygan Falls has slight regard for his fellow mayor, Daniel Webster Hoan of Milwaukee, which was shunned by Kinite in its return to the state.
>
> " 'Mayor Hoan travels around the country telling how well Milwaukee is governed,' said the mayor of Sheboygan Falls. 'Meanwhile terrorists bomb Milwaukee's police stations and banks. Mayor Hoan himself is to blame for those bombings.' "

A consideration of that article in its entirety was necessary for an understanding of its spirit and purpose. It also became necessary to review the conduct of the petitioner in the office of Mayor of Milwaukee for a period of nearly twenty-five years, his discharge of the duty to maintain law and order, and lapses therein, a series of bombings which had recently occurred, certain other violence which had occurred over a long period of years, some bombings which had occurred in previous years, and a discussion by Leighton in the course of the interview of the measures which he had taken, the results of which he contrasted with those employed by the petitioner as Mayor of the City of Milwaukee.

The testimony covers 846 pages of transcript (R. 68-145) and the exhibits 92 pages (R. 146-155).

The case was submitted to the jury on a special verdict consisting of 12 questions.

The first and second questions went to the interpretation of the language complained of as containing charges of criminal conduct.

The third, fourth and fifth questions went (a) to its interpretation as containing a charge of neglect in the performance of duty as a public officer, (b) whether that tended to bring him into shame, humiliation and disgrace, and (c) whether it was fair comment.

The sixth to the tenth questions dealt with malice.

The eleventh and twelfth questions dealt with damages, compensatory and punitory.

The verdict was returned in the Circuit Court on June 28, 1940 (R. 44-46, Case 43-45).

The jury found:

(1) that a person of average intelligence and comprehension, reading the entire article, would naturally have understood that it was stated and charged "that the plaintiff was guilty as a *principal* of the crime of malicious destruction of property;"

(2) that such a person would naturally have understood that it was stated and charged "that the plaintiff was guilty as *accessory* before the fact of the crime of malicious destruction of property;"

(3) that such person would naturally have understood the statement to charge him "with such *neglect* in the performance of his duty *as mayor* of the city to preserve the peace and good order of the city, as to charge him with *moral responsibility* for the bombings;"

(4) that the statement tended or calculated to bring the plaintiff into shame, humiliation or disgrace;

(5) that the statement in the light of the article as a whole was not a fair comment on the acts and conduct of the plaintiff in the performance of his duties as mayor;

(6) that in writing the article, Eklund was actuated by malice;

(7) that in publishing the article on November 3rd the Journal Company was actuated by malice;

(8) that in publishing the article on November 4th, the Journal Company was actuated by malice;

(9) that in publishing the article on November 3rd, Grant was actuated by malice;

(10) that in publishing the article on November 4th, Grant was actuated by malice;

(11) that if the court should be of the opinion that the plaintiff was entitled to recover, his compensatory damages should be assessed at $10,000; and

(12) that his punitory damages were $10,000.

The Circuit Court, on October 10, 1940, reversed the answers to the first and second questions which went to the interpretation of the language complained of as containing charges of criminal conduct, and, directed judgment notwithstanding the remaining answers (R. 64-66, Case 63-65), which, except for the assessment of damages, were characterized by the trial judge as relating to "matter of privileged criticism and comment" (R. 52, Case 51).

The Circuit Court judgment was entered on October 11, 1940 (R. 67, Case 66).

The Supreme Court rendered its decision on May 20, 1941 (R. 498-515).

A motion for rehearing was filed on June 6, 1941 (R. 515-516), and decided on July 7, 1941 (R. 517-518).

On the motion for rehearing, the petitioner, for the first time, contended "that in the trial of the action he was denied due process of law and equal protection of the law under the Fourteenth amendment. * * *" (R. 517-518.)

It is not contended here that there was a denial of due process of law. As that claim is not set forth in the petition, it must be deemed abandoned.

There is no reference, specific or inferential, to a deprivation of property without due process of law.

The only decision of this Court cited deals solely with equal protection of the law.

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (Petitioner's Brief, 39; Petition, 17).

NO JURISDICTION TO REVIEW

Petitioner claims that his right to equal protection of the law, a "title, right, privilege or immunity is [was] specially set up and claimed by either party [in this case, the petitioner] under the constitution," and has been denied. (Petition, p. 17.)

Reduced to its last analysis, the petitioner's sole claim here is that he was denied equal protection of the law because, as he claims, the reversing of these two answers and the granting of judgment to the defendants notwithstanding the verdict amounted, in view of the evidence, to an arbitrary departure from the established and still existing law of Wisconsin; and was "virtually laying down one rule of law for him and precisely an opposite rule for others." (Petitioner's brief, p. 40.)

Petitioner's claim is tantamount to a charge of judicial dishonesty. Anything less would be insufficient on its face to invoke the jurisdiction of this court because the Fourteenth Amendment does not guarantee uniformity of decisions or freedom from error,

> *Milwaukee Electric Railway Co. v. Milwaukee,* 252 U. S. 100.

> [252 U. S. 100, 106] " * * * the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, 569, any more than in guaranteeing due process it assures immunity from judicial error, *Central Land Co. v. Laidley,* 159 U. S. 103; *Tracy v. Ginzberg,* 205 U. S. 170. * * *"

> *Patterson v. Colorado,* 205 U. S. 454, 461;

nor would the abridgement of the right to a jury trial infringe the "equal protection" clause of the Fourteenth Amendment.

> *Chappell Chemical and Fertilizer Company v. Sulphur Mines Company,* 172 U. S. 474, 475.

It is submitted the most cursory reading of the petition and brief together with the opinion of the State Supreme Court discloses that petitioner's grave charge is wholly and completely without support. There is no substantial federal question presented and hence no jurisdiction for review.

QUESTIONS PRESENTED

The fundamental question presented is this:

Did the courts of Wisconsin discriminate against the petitioner in violation of the Fourteenth Amendment?

That involves certain subsidiary questions.

These are:

1. Did the Wisconsin law leave it to the court to determine in libel cases whether the language complained of is susceptible to the interpretation contended for?

2. Did the law of Wisconsin leave to the court, under the circumstances presented by the evidence, the determination of the question whether the language was used in the exercise of the right of fair comment?

3. Under the Wisconsin law, were these powers lost to the court once the case was submitted to the jury?

The petitioner makes no claim of deprivation of property without due process of law. There could be no such claim in a libel action, since the action does not involve property.

Abbott v. Tacoma Bank of Commerce, 175 U. S. 409, at 413 and 414.

NO SUBSTANTIAL FEDERAL QUESTION

The petitioner has not furnished a statement showing the grounds upon which he contends that the questions involved are substantial, as he was required to do under Rule 12.

We will assume that, if the courts of Wisconsin deliberately and dishonestly discriminated against the petitioner in

respect to the substantive law of that state, there might be presented a substantial federal question.

That is not this case.

The ground upon which the petitioner claims a right to review is that, while the judicial action (i. e., determining whether the language used was susceptible to the interpretation contended for, and whether it constituted justifiable comment) could have been taken at some earlier stage in the trial, it could not, conformably to the Wisconsin law, be taken at a later stage (Petitioner's Brief, p. 26). That presents no substantial federal question.

If that action could properly have been taken at any stage, the failure to act at any given stage before judgment would not be a matter going to substance. If the ultimate determination is in accordance with the substantive law of the state, and due process has been accorded, a mere variation from a rule of procedure would not present a substantial federal question on denial of the equal protection of the law.

PETITIONER FAILED TO RAISE FEDERAL QUESTION AT THE PROPER TIME: AND FAILS TO SHOW HOW IT WAS RAISED.

The petitioner does not state the precise manner in which he claims that he was denied equal protection of the law or discriminated against.

He suggests, rather than states, that the court arbitrarily departed from the fixed and still existing libel laws of the state, and from fixed and still existing rules of state court practice in the trial of jury cases.

If the petitioner's position were sound, the objection could have been raised at any of the following stages:

(1) In opposing the defendants' motions for a directed verdict (R. 145, Case 144; R. 447, Supp. Case 273);

(2) in opposing the defendants' alternative motions after the return of the verdict to change answers, and

for judgment notwithstanding the verdict (R. 46-50, Case 45-49);

(3) on the order to show cause why the decision of the trial court as first announced should not be modified before the entry of a formal order (R. 55-64, Case 54-63; and

(4) on the assignment of error required to be incorporated into the appellant's brief on the original presentation in the State Supreme Court.

If the petitioner had a right under the Fourteenth Amendment to demand that this case be submitted to the jury, he should have raised the question in opposing the motion to direct a verdict.

If he had a right, under the Fourteenth Amendment, to demand that judgment be entered on the verdict, once it was rendered, it was his duty to raise the question in opposing the alternative motions to change the answers and for judgment notwithstanding the verdict.

If he desired to challenge any action that the court might take at that stage before judgment as being a violation of the Fourteenth Amendment, it was his duty to raise the question so that the trial court might avoid error if any there were.

He had three opportunities to raise the question in the trial court.

The appeal to the Supreme Court in Wisconsin is taken on a very simple notice addressed to opposing counsel and the Clerk of the trial court (R. 495-496).

There is no provision at that stage for a specification of the grounds for the appeal. There is, however, a provision for an assignment of the errors relied upon. It is found in the Supreme Court Rules, printed as part of the Wisconsin Statutes for 1939, and reads as follows:

"[251.264] *Rule 10.* (As amended August 9, 1921.) The brief of appellant or plaintiff in error shall contain a concise statement of the nature of the action and the

> issues involved, the result of the trial in the court below, *the errors relied upon,* the leading facts or conclusions which the evidence tends to prove, the principles of law applicable and the authorities in support thereof, giving the names of both plaintiff and defendant, number, name, and page of report each time the case is cited."

The appellant's brief has not been returned in the record. Neither does the record show the assignment of errors embodied therein. We submit, therefore, that the record does not show when and how the federal question was raised, and that for that reason alone, the petition must be denied.

The *per curiam* memorandum disposing of the motion for rehearing indicates that the question was raised for the first time on a motion for rehearing.

We respectfully submit that at that stage it came too late.

Minnich v. Gardner, 292 U. S. 48, at 53.

The motion for rehearing does not disclose the ground on which it was based (R. 516). It follows, therefore, that the *method* of raising the federal question is not shown in accordance with subsection 1 of Rule 12. There were no quotations of specific portions of the record where the matter appears. It can appear nowhere except in the printed argument in support of the motion for a rehearing. The pertinent rules on this subject are the following:

> "[251.37] *Rule 37.* (As amended June 29, 1933.) Every motion for a rehearing shall be filed within twenty days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same.
>
> "[251.38] *Rule 38.* The papers in any cause wherein a motion for a rehearing is made shall be retained until the motion shall have been disposed of.
>
> "[251.39] *Rule 39.* (As amended January 11, 1913.) A motion for a rehearing shall not be argued orally, but *shall be submitted on printed arguments,* of which twenty copies shall be furnished to the clerk."

This printed argument has not been returned as part of the record.

That makes it impossible to comply with Rule 12.

PETITIONER FAILED TO PRESERVE ANY OBJECTION ON PROCEDURE

The petitioner made no request for the submission of any of the issues embodied in the questions going to liability.

He requested the court to submit the case on a special verdict which did not embody any of the issues under questions 1 to 5 (R. 40-42, Case 39-41).

He objected to the submission of question 3, first tentatively numbered 5 (R. 456-458, Case 282, 284).

He did not, as did the defendants, move for a new trial in the event that his motion for judgment should not be granted (for illustration, see No. 12 of defendants' motions, R. 50-51, Case 49-50).

Nor did he make any such motion following the handing down of the opinion of the trial court, although he did move to strike out a portion thereof (R. 55-56, Case 54-55).

If the trial court erred, not in a matter of substance but in a matter of procedure, by making a determination on a motion after verdict which ought to have been made before the submission of the verdict, then surely, he should not be heard in this Court in the absence of a motion for a new trial in the state court.

NO VALID REASON FOR GRANTING WRIT

The trial court determined that the language complained of was not susceptible to the interpretation that it charged crime, that, correctly interpreted, it consisted merely of a justifiable comment on the activities of the petitioner as a public officer, changed the answers carrying the interpreta-

tion of a charge of crime, and then rendered judgment notwithstanding the verdict.

1.

Under the Wisconsin Law, It Was the Duty of the Court to Determine Whether the Language Complained of Was Susceptible to the Interpretation Contended For.

The defendants objected to the submission of questions 1 and 2 (R. 459, Supp. Case 285). As to each of these questions, they also asked that if it be submitted, it be submitted with the inclusion of a directed answer (as to question 1, R. 451, Supp. Case 277; as to question 2, which had tentatively been framed as 3, R. 452, Supp. Case 278; and again as to both, R. 453, Supp. Case 279).

Before the framing of the special verdict, the defendants had moved for a directed verdict (R. 447-448, Supp. Case 273-274).

After the return of the verdict, the defendants moved that the answers to these two questions be changed. Thus, at every stage, the court was asked to determine whether the language complained of was susceptible to the interpretation contended for.

It had been the established law of Wisconsin for nearly seventy years that this is a question for the court; and we shall presently point out that in his brief in this court, the petitioner concedes that this was a question for the court.

The trial judge, in passing on the motions to change the answers to these questions, said:

> "All of the facts and circumstances tending to throw light upon the propositions involved in the first and second questions point unmistakably to the conclusion that a person of average intelligence and comprehension, who read the entire article in which the language in question appeared could not reasonably have understood the language complained of to convey the meaning that

plaintiff was guilty of the crime, either as principal or accessory, of malicious destruction of property." (R. 54; Case 53.)

This was quoted and approved by the Supreme Court of Wisconsin (R. 507-509).

The Supreme Court said:

> "The court determines whether a communication is capable of a defamatory meaning while it is the function of the jury to determine whether a communication capable of a defamatory meaning was so understood by its recipient." (R. 514.) (238 Wis. 329.)

This it was declared had been the law of the state since 1871. In support of its conclusion, the Supreme Court cited the following authorities:

Filber v. Dautermann (1871), 28 Wis. 134;
Grell v. Hoard (1931), 206 Wis. 187, 239 N. W. 428;
Singler v. Journal Co. (1935), 218 Wis. 263, 260 N. W. 431.

To this we add:

Robertson v. Edelstein (1899), 104 Wis. 440, 443, 80 N. W. 724; and
York v. Cole (1926), 190 Wis. 179, 208 N. W. 944.

It is the duty of the court in Wisconsin to determine whether or not the words complained of could naturally and reasonably be interpreted as defamatory.

York v. Cole, 190 Wis. 179, 208 N. W. 944.

> [190 Wis. 181, 182] "It has been often held that if there be but one reasonable construction that can be given to the words used it is for the court to say whether or not such be libelous, * * *. [Citing cases]"

Singler v. Journal Co., 218 Wis. 263, 260 N. W. 431.

[218 Wis. 268, 269] "* * * If the meaning of the publication is clear and unambiguous, *the issue is for the court. Williams v. Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183; *York v. Cole*, 190 Wis. 179, 208 N. W. 944; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111; *Leuch v. Berger*, 161 Wis. 564, 155 N. W. 148; *Putnam v. Browne*, 162 Wis. 524, 155 N. W. 910. * * *" (Italics ours.)

The petitioner concedes in this court the power, propriety and right of the trial judge to determine whether the language complained of is susceptible to the interpretation contended for by the plaintiff. He says:

> "At the trial no one doubted the power or propriety of the trial judge to say whether or not the libelous language published by the defendants was susceptible of the meaning attributed to it by the plaintiff, but that it was for the jury to say whether such was the true meaning of the language used." (Petitioner's Brief, 26.)

Since it was the duty of the court to determine whether the language complained of was susceptible of a libelous interpretation, it was the duty of the court to exercise that power in connection with the first two questions in the special verdict. If convinced that the language was not susceptible to such an interpretation, it was the duty of the court (a) to direct a verdict, (b) to direct the answers to be given to these two questions, and (c) to change the answers on the motions following the verdict.

2.

Under the Wisconsin Law, It Was the Duty of the Court to Determine Whether There Was a Jury Issue on Fair Comment, and In Deciding That question, to Resolve Doubts in Favor of Free Criticism and Discussion.

This principle had been followed nearly ten years before in *Grell v. Hoard* (1931), 206 Wis. 187, 239 N. W. 428. In that case the court had said:

> [206 Wis. 192] "We feel that in doubtful cases the doubt should be resolved in favor of free criticism and discussion."

That case was cited by the trial judge in his decision on motions after verdict (R. 52-55, Case 51-54).

The Supreme Court cited it and quoted from it for the purpose of showing the then existing law of Wisconsin (R. 507, 508, 511).

The petitioner contends that the decision is not applicable, and argues that the Supreme Court of Wisconsin erred in the view that it established the law on this question (Petitioner's Brief, 34-36).

It is for the Supreme Court of Wisconsin to say what the Wisconsin law on the subject is, and what it was at the time that the decision was rendered.

That is not a question for this court.

The Fourteenth Amendment does not transform this court into a court of appeal where all decisions of state courts involving merely questions of general justice can be reviewed.

> *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 157.

That the petitioner is simply asking this court to review the decision of the Wisconsin Supreme Court on a matter of Wisconsin law is emphasized further by the reference to *Walters v. Sentinel Co.* (1918), 168 Wis. 196, 169 N. W. 564 (Petitioner's Brief, 34).

The argument based on that case was considered and answered by the Wisconsin Supreme Court (R. 153).

Hence it follows that it was for the Supreme Court of Wisconsin to determine whether there was any jury issue on fair comment.

3.

Under the Wisconsin Law, the Power of the Court to Decide These Questions Continued Up to the Entry of Judgment.

The petitioner argues that the court, having submitted the issues to the jury, lost its power further to control the matter by changing the answers in the verdict or granting judgment *non obstante* where it determines that there is no evidence to support the verdict. Thus he says:

> "So the judge functioned completely in his right to determine whether or not the libelous language complained of was susceptible of the interpretation placed upon it by the plaintiff." (Petitioner's Brief, 27.)

The power and duty of the trial judge to determine that question continued until the entry of the judgment.

Robertson v. Edelstein (1899), 104 Wis. 440, 80 N. W. 724.

> [104 Wis. 443, 444] "If it appear that the expression as used could not naturally and reasonably be understood by people of ordinary understanding to charge the crime, it becomes the duty of the court to hold it not slanderous, *whether presented on demurrer or by proof upon the trial. Montgomery v. Deeley,* 3 Wis. 709; *Campbell v. Campbell,* 54 Wis. 90; *Bradley v. Cramer,* 59 Wis. 309; *Schild v. Legler,* 82 Wis. 73, 75; *Pandow v. Eichsted,* 90 Wis. 298; * * *" (Italics ours.)

And where the Court should have directed a verdict but failed to do so, it is its duty to grant a motion for judgment notwithstanding the verdict where the jury errs.

Hammacher v. New Berlin (1905), 124 Wis. 249, 102 N. W. 489.

> [124 Wis. 253] "* * * Upon the undisputed facts, therefore, he was not entitled to recover, and a verdict for the defendant should have been directed. *Failing in this, the court properly granted judgment for the defendant notwithstanding the verdict. Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800." (Italics ours.)

Similarly where the verdict is contrary to the evidence it may be changed to correspond with the facts, and judgment rendered thereon as changed; or, judgment may be rendered notwithstanding the verdict.

Hay v. City of Baraboo (1906), 127 Wis. 1, 105 N. W. 654;

Chybowski v. Bucyrus Company (1906), 127 Wis. 332, 106 N. W. 833;

LaMotte v. Retail Hardware Mutual Fire Insurance Company of Minnesota (1931), 203 Wis. 41, 233 N. W. 566.

In fact, if the legislature adopted a rule in accordance with petitioner's contention, it probably would be unconstitutional as an undue invasion of the power of the courts. (See *Thoe v. Chicago, Milwaukee & St. Paul Railway Company* (1923), 181 Wis. 456, 195 N. W. 407.)

In other words, the procedure followed by the trial court in changing the answers to questions 1 and 2 and ordering judgment for the defendants notwithstanding the answers to questions 3 to 12, as well as the judgment rendered in accordance therewith, was "due process of law," and it was strictly in accordance with rules and principles long established and followed by the courts of Wisconsin in similar cases as shown by the cases cited above. Text books on procedure and practice point out this practice.

Bryant Wisconsin Pleading and Practice, 2nd Ed. Vol. III, Sec. 484:

> "* * * But an answer may be changed by the court if there is no evidence to support it or it is contrary to all the evidence, or practically without support in the evidence. * * *" [Numerous cases are cited.]

The court was acting in strict accord with rules of law long established in Wisconsin.

The court in no manner discriminated against the peti-

tioner. It acted in his case precisely as it was required to act, and as it had acted in other cases.

In Wisconsin today, the bar and the bench prefer the submission of cases under the special verdict. The judges and the bar habitually analyze cases with a view to ascertaining the ultimate issues involved and are adept in so framing the special verdict as to present those issues and thus to dispose of the case.

The juries are not compelled to acquire a knowledge of the law applicable to a given case, and then to analyze the various issues of fact and to set up the varying hypotheses upon which to make their application of the law in arriving at a result. They are relieved of a great deal of work which is very difficult for anyone except a judge trained in the law.

The special verdict should cover every material disputed issue of fact. The verdict can and should be so framed that each question will admit of a direct answer, and that, whatever answers be returned to the questions, but one judgment may follow thereon.

The answer to one question may eliminate the necessity of a consideration of others, and these others may be submitted to be answered only if a given answer shall have been made to the one preceding.

The test as to the sufficiency of the evidence to support the finding of the jury on any one of the issues submitted is the same as that presented in determining the sufficiency of the evidence to support a general verdict.

In practice, it has been found that when a case is submitted under the special verdict, the court may, with greater safety, reserve doubtful questions of fact and law for further consideration on motions to be heard after the verdict. These motions are substantially the same in principle as those which may be made after a general verdict. The special verdict frequently eleminates the necessity for a new trial. The finding of the jury on each question may be re-

considered on a motion for judgment notwithstanding the verdict; and *in Wisconsin that motion is open to the defendant as well as to the plaintiff.*

Each party may submit requests as to the issues to be covered in the special verdict. If, as to any issue, there is a failure to ask the submission of a question, that issue is thereby submitted to the court, and, in the absence of an express ruling, is deemed to have been decided by the court in the manner required to sustain the judgment which is finally entered.

4.

Questions 2 to 5 Were Withdrawn From the Jury By Their Affirmative Answer to Question 1; and It Would Have Been Proper to Change the Answer to Question 1 From Yes to No, and to Enter Judgment Dismissing the Complaint.

Questions 2, 3, 4 and 5 were submitted to the jury only if they answered each preceding question in the *negative.* They answered question 1 *affirmatively.* This removed from their consideration questions 2 to 5.

McGeehan v. Gaar, Scott & Co. (1904), 122 Wis. 630, 100 N. W. 1072.

[122 Wis. 634] "* * * *The fifth question was only* submitted to the jury in a certain contingency, i. e., *if they had already answered the fourth question, and answered it in the affirmative.* Inasmuch as it appears that *they answered the fourth question in the negative,* it is evident that *the fifth question was never submitted to them by the court, and the question and answer drop entirely from the case and may be disregarded."* (Italics ours.)

Under these circumstances it would have been proper to change the answer to question 1 from "Yes" to "No," to disregard the answers to questions 2 to 5 inclusive, and to enter judgment dismissing the complaint.

The disregard of the court's direction led to one very illogical result.

The jury interpreted the article, in the answer to question 1, as charging the plaintiff with *participating as a principal* in the bombings; in the answer to question 2, as being *his own accessory;* and in the answer to question 3 as having been so *negligent* as a mayor as not to have prevented his own criminal acts.

RETURN INCOMPLETE

The return from the Supreme Court of Wisconsin does not actually contain the transcript in that court. It contains merely the printed case and a supplement thereto. These are not prepared by the court. They are prepared by counsel for the respective parties.

The fact that they do not contain all that is in the transcript is apparent from the references to the record.

We have no objection to having the court determine the right to a review on this printed record; but take this occasion to say that if a writ were granted, we would insist, either that the original record be transmitted, or that the printed record be supplemented by abstracts of certain portions thereof.

CONCLUSION

There has been no discrimination by the Wisconsin courts against the petitioner either in the determination of the substantative law as to his claim or in the procedure afforded the plaintiff to test his claim. The Wisconsin court in testing the sufficiency of the evidence to support the jury's answers to the questions of the special verdict acted in accordance with the long established law of Wisconsin. Petitioner's claim of an invasion of his right to equal protection of the law guaranteed by the Fourteenth Amendment is

wholly groundless and frivolous. It is submitted that the situation here presented is not unlike that presented in *Wagner Electric Manufacturing Company v. Lyndon, et al.*, 262 U. S. 226, where this court dismissed an appeal "because the grounds of the appeal are frivolous" and imposed a $1,500 penalty and costs on the appellant, holding that the direction of a verdict by a trial court was not a denial of any rights under the federal constitution.

> [262 U. S. 226, p. 232] "* * * More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by *Treat Manufacturing Co. v. Standard Steel & Iron Co.*, 157 U. S. 674), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Walker v. Sauvinet*, 92 U. S. 90; *Missouri v. Lewis*, 101 U. S. 22, 31; *Twining v. New Jersey*, 211 U. S. 78, 110, 111; *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 217. * * *"

The petitioner has had a trial by jury although it is clear that no right secured to him by the Fourteenth Amendment would have been infringed if he had not had a trial by jury.

Walker v. Sauvinet, 92 U. S. 90.

> [92 U. S. 90, 92] "* * * A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but *this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury.* This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessees v. Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. * * *"

We respectfully submit that the petition for a writ of certiorari should be denied.

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